

Covid-19 and Derogations Before the European Court of Human Rights

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2020-04-10T08:35:48

Many argue that derogations, permitted under many human rights instruments, provide a useful framework for assessing whether any human rights infringements that arise from emergency provisions adopted in response to Covid-19 are justified (see excellent posts from Greene [here](#) and [here](#)). However, underpinning such arguments is an assumption that those scrutinising state approaches, such as courts, will involve themselves in what are clearly trying times requiring difficult political, economic, social, and legal measures on the part of governments. Drawing on jurisprudence from the European Court of Human Rights (ECtHR or the Court) in relation to Northern Ireland, this post argues that it is likely that the vast majority of cases exploring derogation will be found in a government's failure.

Derogations in response to Covid-19

As of Wednesday 8th April, [Serbia](#) (6 April 2020); [Romania](#) (2 April 2020); [North Macedonia](#) (1 April 2020); [Albania](#) (31 March 2020); [Georgia](#) (23 March 2020); [Estonia](#) (19 March 2020); [Republic of Moldova](#) (19 March 2020); [Armenia](#) (19 March 2020); and [Latvia](#) (17 March 2020) have all informed the Secretary General of the Council of Europe of their intention to derogate from their obligations under the Convention for the Protection of Human Rights and Fundamental Freedom (ECHR). The right to derogate from obligations contained in the ECHR is included under Article 15 (see, for similar provisions, Article 4(1) of the [International Covenant on Civil and Political Rights](#); Article 27(1) of the [American Convention on Human Rights](#); and Article 30 of the 1961 [European Social Charter](#)). It provides that:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

As an example of the practical application of an Article 15 derogation, [Latvia notified](#) the Secretary General of its intention, in light of Covid-19, to derogate from certain obligations under Articles 8 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 2 of Protocol No. 4 to the [Convention for the Protection of Human Rights and Fundamental Freedoms](#) (ECHR). ‘Emergency’ for the purposes of Article 15 ‘refer[s] to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed’ ([Lawless v. Ireland \(no. 3\)](#), § 28). The logic of derogations is straightforward: during a state of emergency, governments need flexibility to address emerging threats and to exercise all power vested in the state to alleviate the situation even when certain rights might be impinged as a result of such measures.

Nevertheless, there are differences in opinion regarding the appropriateness of derogating from the ECHR in response to Covid-19. [Alan Greene](#), for instance, assesses that if the exigencies of the COVID-19 pandemic require exceptional measures and deviation from some dimensions of the full enjoyment of all human rights, then it is best to introduce those measures through a framework that entails a commitment to legality and to the full restoration of normalcy as soon as possible.

Others opine that most measures taken to prevent the spread of the coronavirus are already covered by international human rights law. The most fundamental human rights are “absolute”. Under the ECHR, these include the ban on the death penalty, torture and forced labour. Most rights, however, are not absolute in character and states can limit the exercise of these rights for valid reasons, including public health emergencies. Examples are the rights to freedom of expression, freedom of association, freedom of assembly, and freedom of movement. For instance, Article 8(2) of the European Convention stipulates that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Thus, [Kanstantsin Dzehtsiarou](#) outlines how, as a result of permissible limitations under the ECHR, human rights as a whole and the ECHR in particular are not the obstacles to effective governmental measures targeting the pandemic. He argues that it is especially crucial in case of emergency to hold on to human rights, to keep the authorities accountable and within certain limits because the crisis legislation giving new extensive powers to the executive branch can have long-lasting disproportionate effects on our lives, our freedoms and our societies. He suggests that in the case of a pandemic, Article 15 derogations are not particularly useful, and they send an unnecessary message to people that states will start limiting their human rights. This reflects what [Jones \(1995\)](#) feared would be a ‘devaluation of Convention rights and freedoms’. Because derogation is not possible from absolute rights and because most human rights are necessarily limited, he contends that derogations are largely irrelevant. For Greene, however, it would be

the *failure to use* the derogation option that today ‘risks normalising exceptional powers and permanently recalibrating human rights protections downwards’. He notes that through reliance on limiting rights, such as that of Article 8(2), ‘we are left with a de facto state of emergency that enables the same powers but lacking the transparency, additional oversight and supervision that should accompany a de jure state of emergency’ (see also Scheinin’s [contribution](#) to this debate).

What role for the European Court of Human Rights?

Both scholars offer compelling arguments, invoking different opinions regarding the persuasiveness of each position. Indeed, in ways, each perspective enjoys support from countries that have issued notices of derogation on one hand and others, such as Spain, Italy and the UK, which have opted not to, on the other (see [Greene](#)’s post on The Conversation). For Greene:

Declaring a state of emergency under Article 15 of the ECHR and expressly acknowledging the unpalatable and temporary nature of these measures is best practice. It ensures that other states and international human rights organisations can monitor and even police how powers are being implemented.

But given that the ECtHR will undoubtedly be called to examine whether and to what extent emergency provisions are compatible with the ECHR, to what extent is this mechanism likely to act as a safeguard for individual rights (for an excellent discussion on the role of courts during the Covid-19 pandemic see Matt Pollard, Mathilde Laronche and Viviana Grande, [part 1](#) and [part 2](#))? Drawing on jurisprudence from the Court in relation to the conflict in Northern Ireland, this post argues that it is likely that the vast majority of cases exploring derogation will be found in a government’s failure.

Examples from the Court’s Approach to Northern Ireland Conflict

The ECtHR has consistently been asked to determine whether infringements to human rights are justified pursuant to Article 15 derogations. In the [Lawless case](#), the Court concluded that the special powers of detention conferred upon the Ministers of State under the Offences against the State (Amendment) Act of 1940 were contrary to Article 5(1)(c) and (3) of the European Convention on the grounds that the five-month-long detention of Mr. Lawless “was not ‘effected for the purpose of bringing him before the competent legal authority’ and that during his detention he was not in fact brought before a judge for trial ‘within a reasonable time’” as prescribed by those provisions. As Mr. Lawless was never brought before a judge for either of these purposes, his detention violated Article 5 of the Convention and the Court had therefore to examine whether this violation could be justified under Article 15(1) of the Convention as being “strictly required by the exigencies of the situation” obtaining in Ireland in 1957. The Court concluded that, subject to these safeguards, “the detention without trial provided for by the 1940 Act appears to be a measure strictly required by the exigencies of the situation” within the meaning of Article 15 of the Convention.

The case of [*Ireland v. the United Kingdom*](#) concerned various powers of extrajudicial deprivation of liberty used by the United Kingdom in Northern Ireland. Here, the Court concluded that:

“It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency... In this matter Article 15 § 1 (...) leaves those authorities a wide margin of appreciation” ([*Ireland v. the United Kingdom*](#), § 207)

In [*Brannigan and McBride*](#), which also concerned anti-terrorist legislation in the United Kingdom, the Court had to consider the lack of judicial intervention in the exercise of the power to detain suspected terrorists for up to seven days. The case arose out of the derogation made by the United Kingdom Government after the Court found a violation of Article 5(3) in the *Brogan and Others* case, in which it concluded that the applicants had not been brought “promptly” before a court. The Court acknowledged that:

“The Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether inter alia the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision... At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation” ([*Brannigan and McBride v. the United Kingdom*](#), § 43).

However, rejecting the applicants’ argument in the *Brannigan and McBride* case that the derogation was not a genuine response to an emergency and that it was premature, the Court concluded that, having regard to: (1) “the nature of the terrorist threat in Northern Ireland”, (2) “the limited scope of the derogation and the reasons advanced in support of it” and (3) “the existence of basic safeguards against abuse”, the United Kingdom Government had “not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation”.

This conclusion was confirmed in the case of [*Marshall v. the United Kingdom*](#), which was declared inadmissible by the Court and was therefore not considered on the merits. The applicant complained that his detention for seven days violated his right under Article 5(3) of the Convention to be brought promptly before a judicial authority. Furthermore, he contended that he had no effective remedy to challenge his detention before a domestic court. In his view, the delay constituted a violation of the requirement of promptness in Article 5(3) of the Convention that could not be justified under Article 15(1) as being “strictly required by the exigencies of the situation” because statistics showed that “at the material time most individuals detained under section 14 of the 1989 Act were released without charge”, which meant that the police were “using the power to gather information, or to arrest

individuals against whom there [was] very little or no evidence". Yet, the court concluded that:

"at the time of the applicant's arrest the continued reliance on the system of administrative detention of suspected terrorists for periods of up to seven days did not result in the overstepping of the margin of appreciation which is accorded to the authorities in determining their response to the threat to the community. The reasons which the Government gave in the Brannigan and McBride case against judicial control continue to be relevant and sufficient."

While it is, of course, difficult to draw comparisons between the response of the ECtHR to conflict situation in Northern Ireland and Covid-19, or to second guess the Court's response to the pandemic in the future, these examples demonstrate a tendency, on the part of the Court, to give states a relatively wide degree of deference regarding how they choose to respond to emergency situations (see [Natasha Holcroft-Emmess](#)). In this way, derogations might well be less useful in protecting rights that might first appear, particularly if states are able to justify their responses in light of the largely unprecedented and unknown nature of Covid-19.

A wide degree of deference to states

It is likely that the Court will be called upon to rule on whether particular measures and provisions adopted by states in response to Covid-19 are 'strictly required by the exigencies of the situation' as laid down under Article 15 ECHR. The argument that derogations provide a framework for assessing whether any human rights infringements are justified with reference to Article 15 of the Convention is a strong one. However, underpinning this argument is an assumption that those scrutinising state approaches, such as courts, will be willing to engage with decisions taken in what are clearly trying times requiring difficult political, economic, social, and legal measures on the part of governments. Given the relatively unprecedented nature of Covid-19, the, at times, conflicting medical evidence guiding government responses and different impacts and rates of infections across different countries, it is likely that the Court will apply a wide degree of deference to states. While the comparisons with the response to emergency measures adopted during the conflict in Northern Ireland and those currently being adopted to address Covid-19 are perhaps spurious, as a form of guidance and to facilitate presumption, the former might go some way in helping elucidate the likely approach adopted by the ECtHR when asked to consider how states have handled the Covid-19 pandemic.

